No. 15-16909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOE I, DOE II, IVY HE, DOE III, DOE IV, DOE V, DOE VI, ROE VII, CHARLES LEE, ROE VIII, DOE IX, LIU GUIFU, WANG WEIYU, and those individuals similarly situated,

Plaintiffs-Appellants,

v.

CISCO SYSTEMS, INC., JOHN CHAMBERS, and FREDY CHEUNG,

Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District Of California At San Jose

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

Kathleen M. Sullivan
Isaac Nesser
Todd Anten
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
Attorneys for Defendants-Appellees

June 6, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

PRELIMINARY STATEMENT

Defendants respectfully submit this supplemental brief in response to the Court's Order (ECF 49) instructing the parties to "address[] the impact" of the decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), and to Appellants' Supplemental Brief (ECF 56). *Jesner* reinforces that this Court should affirm the district court's dismissal of plaintiffs' ATS claims.

Jesner held that "foreign corporations may not be defendants in suits brought under the ATS," 138 S. Ct. at 1407, but the decision's reasoning also counsels against allowing an ATS suit against a U.S. corporation like Cisco. Under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), as reaffirmed in *Jesner*, a court faces a two-step process in recognizing an ATS cause of action: it must find (1) a "specific, universal, and obligatory" norm of international law, and (2) a basis to create a federal common-law cause of action to enforce that international law norm. *Id*. at 732-33 & nn. 20-21. *Jesner*'s resolution at both steps supports affirmance here.

As to step one, *Jesner* found that there exists no "specific, universal, and obligatory norm of corporate liability in currently prevailing international law," as international tribunals have limited their authority "to natural persons," 138 S. Ct. at 1401 (plurality op.). That view applies to domestic as well as foreign corporations.

As to step two, the Court declined to recognize a federal common-law cause of action against foreign corporations for reasons that apply equally to U.S. corporations:

a "general reluctance to extend judicially created private rights of action" even in a domestic context, *id*. at 1402, and a concern that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," *id.* at 1403.

Accordingly, *Jesner* reinforces the case for affirmance in three ways.

First, *Jesner* suggests that ATS liability is not available against corporate defendants, foreign or domestic, under international law norms, and counsels caution before allowing such liability, given its potential to upend foreign policy and create international strife. This is especially so for claims that (as here) accuse a foreign government of violating the rights of its own citizens on its own soil, where the alleged conduct has a negligible connection to the United States.

Second, contrary to plaintiffs' suggestion (ECF 56 at 1-2), *Doe v. Nestlé USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) ("*Nestlé II*") does not render *Jesner* immaterial; to the contrary, *Nestle II* is undermined by *Jesner*'s reasoning, so it is not controlling.

Third, *Jesner* reinforces the already strong grounds for affirming the dismissal order—namely, the presumption against extraterritoriality set forth in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and reaffirmed in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

This Court should affirm.

ARGUMENT

I. *JESNER*'S REASONING SUPPORTS DISMISSAL OF PLAINTIFFS' ATS CASE

Jesner counsels against extending ATS liability to domestic and foreign corporations alike. This is so under *Jesner*'s reasoning both at *Sosa* steps one and two. And this is especially on facts like those alleged here, involving conduct by a foreign government against foreign citizens on foreign soil.

A. *Jesner* Suggests That There Is No "Specific, Universal, And Obligatory" International Law Norm Of Corporate Liability

As to *Sosa* step one, *Jesner* noted that "the international community has not" recognized a norm of corporate liability, at least not "in the specific, universal, and obligatory manner required by *Sosa*." *Id.* at 1402 (plurality op.). Without distinguishing between foreign and domestic corporations, it read international law sources as counseling "against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law." *Id.* at 1401.

Although the Court did not decide "whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations," *id.* at 1402, it suggested that it would resolve those questions, if reached, against the extension of ATS liability to corporations. And the answer would apply both to domestic and foreign corporations.

B. *Jesner* Counsels Against Recognizing A Federal Common-Law Cause of Action For U.S. Corporate Liability

Deciding the case instead under *Sosa*'s step two, *Jesner* concluded that there was no basis to extend a federal common-law ATS cause of action against foreign corporations. As the plurality opinion noted, "Congress is in a better position" than the Judiciary to determine "whether and how best to impose corporate liability." *Id.* at 1406. And the reasons the Court gave for reaching this conclusion, supported by five Justices, apply to ATS suits against foreign and domestic corporations alike.

First, *Jesner* reiterated the Court's "general reluctance to extend judicially created private rights of action," noting that "recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law," because such a decision "is 'one better left to legislative judgment in the great majority of cases.'" *Id.* at 1402 (quoting *Sosa*, 542 U.S. at 727). *Jesner* specifically noted that such "caution" must be "extend[ed] to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." *Id.* at 1402-03.[1] Justice Gorsuch's concurring opinion likewise casts doubt on ATS corporate liability even for domestic

[1] *Jesner*'s reluctance to create new ATS causes of action is consistent with a reluctance to recognize aiding and abetting claims under the ATS absent an express statement from Congress. *See* Ans. Br. at 40-41; *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) (presumption against inferring aiding and abetting liability absent plain statement by Congress).

corporations, arguing that "the job of creating new causes of action" belongs to the political branches, and thus the Court "should refuse invitations to create new forms of legal liability." *Id.* at 1412 (Gorsuch, J. concurring); *see also id.* at 1414 (proper application of *Sosa* requires deference to Congress "in the creation of new forms of liability"). And Justice Alito notes that "it is unclear why ATS jurisdiction would be needed" against U.S. corporations given the availability of diversity jurisdiction. *Id.* (Alito, J., concurring) at 1410 & n.*.

Second, *Jesner* declined to extend a federal common-law cause of action against a foreign corporation because, in the ATS context, only "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403. Recounting the international tensions implicated by ATS litigation, the Court emphasized that "judicial caution … 'guards against our courts triggering … serious foreign policy consequences,'" concluding that "courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one." *Id.* at 1407 (quoting *Kiobel*, 569 U.S. at 124). These concerns are likewise present when a domestic corporation is alleged to have aided and abetted a foreign government's conduct on its own soil.

Similarly, Justice Alito's concurrence found the result in *Jesner* compelled "not only by 'judicial caution' … but also by the separation of powers." *Id.* at 1408 (Alito, J., concurring). Opining that courts should decline to create an ATS cause of action

"whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife," Justice Alito reasoned that "customary international law does not *require* corporate liability," so declining to recognize such liability "cannot give other nations just cause for complaint." *Id.* at 1410. He concluded that, "[u]nless corporate liability would actively *decrease* diplomatic disputes, we have no authority to act." *Id.* at 1411. Allowing the suit here would not cause any such decrease.

C. *Jesner*'s Reasoning Applies With Special Force To The Allegations Here

This case thus raises the same foreign policy concerns that led the Court to reject ATS jurisdiction in *Jesner*, and thus counsels the Court's affirmance here. Here, Chinese plaintiffs assert an ATS action for alleged international law violations at the hands of Chinese government officials, on Chinese soil, at Chinese police stations, prisons and detention centers. Extension of ATS liability here thus would displace the political branches in the exercise of foreign policy and have this Court condemn the laws of the People's Republic of China ("PRC") and second-guess carefully considered U.S. trade and export control laws set by Congress and the Executive Branch that expressly permit companies like Cisco to sell the technology at issue here to the PRC. *Jesner*'s counsel of "caution" thus applies with particular force in this case in light of its extensive potential foreign policy consequences.

First, adjudication of plaintiffs' ATS claims would require intrusion upon the propriety of acts of the PRC—in particular, PRC's regulations regarding and treatment

of those detained or imprisoned for violating Chinese law, in which plaintiffs acknowledge Cisco had no involvement whatsoever. Plaintiffs allege that PRC public security officers, officers of a subdivision of the Chinese Communist Party, and other officers subjected them to violations of international law in Chinese police stations, labor camps, and detention centers, based on their adherence to Falun Gong. ER39, 78-94 (¶¶ 41-42, 230-356). There is no dispute that certain activities relating to the practice of Falun Gong are illegal in China, and that criminal penalties for violations of these laws include imprisonment and reeducation through forced labor. SER7-11 (¶¶ 22-39). Moreover, there is no dispute that the allegations of torture of and brutality suffered by plaintiffs at the hands of PRC officials are illegal under Chinese law. SER2-3, 10-11 (¶¶ 7, 36-39). Thus, a court in this Circuit has already dismissed ATS claims against PRC government officials for their acts against Falun Gong practitioners because of the "implications for foreign relations." *Doe v. Qi*, 349 F. Supp. 2d 1258, 1296-1303 (N.D. Cal. 2004). In that case, statements from both the U.S. Department of State and the PRC warned about the potential for Falun Gong ATS lawsuits to interfere with and endanger U.S. foreign policy and relations between China and the United States. *Id.* at 1296-96, 1300.[2] Neither the PRC or the U.S. Department of State have disavowed those warnings.

---

[2] Plaintiffs highlight (ECF 56. at 4-5) that *Qi* issued a declaratory judgment against
(*footnote continued*)

In short, the allegation here is that Cisco should be held accountable under the ATS for Cisco's lawful (under U.S. law) supply of equipment to PRC government purchasers, who then utilized standard features of that equipment to identify individuals who plaintiffs acknowledge had violated PRC law, who in turn were allegedly abused by PRC prison officials. Such attenuation is an unreasonable extension of the law in light of the principles of *Kiobel* and *Jesner*.

Plaintiffs' purported distinction that defendants here are "private U.S. parties" (ECF 56 at 5) rather than PRC officials is illusory; the underlying allegations—indeed, the essential element of liability—necessarily turn on the Court's judgment of the validity of acts of PRC government officials in PRC's own territory relating to PRC's enforcement of its own laws against PRC citizens. *Cf. In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 786 (9th Cir. 2014) ("Aiding-and-abetting liability depends on the existence of an underlying tort."). At a minimum, "judicial caution" instructs that the Court avoid the "perils" of "mak[ing] the required policy judgments" that such assessments require; this Court's adjudication certainly would not "*promote* harmony in international relations" with China. *Jesner*, 138 S. Ct. at 1406-07 (emphasis added).

---

the Chinese officials at issue, but neglect to inform the Court that: (1) *Qi* denied any injunctive relief or monetary damages based upon the intrusion such relief would have on the PRC's sovereignty, 349 F. Supp. 2d at 1301; and (2) Plaintiffs' SAC seeks *only* monetary damages and injunctive relief, not declaratory judgment, ER 114.

Second, Congress and the Executive Branch have already enacted foreign trade policy measures that, while prohibiting the supply of certain technology for use by PRC law enforcement, expressly permit Cisco and its competitors to sell to Chinese government purchasers the kind of routers, switches and other materials at issue here. *See* Ans. Br. 7-9 (detailing Cisco's compliance with U.S.-China trade policy under, *e.g.*, the Tiananmen Act). The fact that the political branches have reviewed and addressed such issues confirms that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," further justifying "great caution" here. *Jesner*, 138 S. Ct. at 1403. Indeed, the Supreme Court has explained that ATS litigation necessarily "implicates serious separation-of-powers and foreign-relations concerns," which is why "ATS claims must be 'subject to vigilant doorkeeping.'" *Id.* at 1398 (quoting *Sosa*, 542 U.S. at 729). That both political branches already considered and acted extensively in this space warrants extensive deference to those judgments. The very examples cited by plaintiffs confirm the appropriateness of such deference. *See* ECF 56 at 4-5 & n.5 (identifying State Department reports and Congressional resolutions). The political branches' active role here counsels in favor of continued deference rather than a "'new private cause[] of action.'" *Jesner*, 138 S. Ct. at 1403 (quoting *Sosa*, 542 U.S. at 727).

Third, the plurality opinion in *Jesner* warned against "establish[ing] a precedent that discourages American corporations from investing abroad," which would deprive

other nations of foreign investment "that contributes to the economic development that so often is an essential foundation for human rights." 138 S. Ct. at 1406. At best, the SAC alleges that Cisco provided the PRC with a neutral security system. Extending liability to Cisco for its sale of routers, switches and other materials that enable Internet connectivity would discourage other U.S. companies from international investment risking that alleged misuse of a corporation's products in another nation could open the door to claims of violations of international law.

Fourth, the "relatively minor connection" between Cisco's alleged U.S. activity and plaintiffs' underlying injury especially warrants judicial restraint here. *Id.* at 1406. Putting aside the paucity of any connection to U.S. territory that could overcome *Kiobel*'s presumption against extraterritoriality, *see id.* (declining to address whether allegations satisfy *Kiobel*), ATS liability would cause unavoidable tension in international relations with China. Cisco—like Arab Bank—is a multinational corporation that does business worldwide, including with foreign governments such as PRC. This is not a case asserting that a purely domestic operation injured an alien in U.S. territory; rather, as Justice Kennedy warned in the *Jesner* plurality opinion, it is an example of "plaintiffs us[ing] corporations as surrogate defendants to challenge the conduct of foreign governments." *Id.* at 1404 (plurality op.). Plaintiffs, their alleged Chinese government assailants, and the alleged injuries were all located in China. The alleged U.S.-based acts of aiding and abetting liability by Cisco—all of which are

impermissibly baseless, vague and conclusory (Ans. Br. 20-26)—have essentially zero connection to those injuries, let alone the "strong and direct" connection required. *Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016).

For the above reasons, plaintiffs err in asserting (ECF 56 at 3-4) that ATS claims against domestic corporations for the acts of foreign participants against foreign defendants on foreign soil present no foreign policy or international relations concerns. Where an assertion of ATS liability against a U.S. corporation threatens to disrupt foreign relations, the very concerns identified in *Jesner* come into play. Indeed, *Jesner* recognized that ATS litigation "*inherent[ly]*" implicates "foreign-policy and separation-of-powers concerns," which is why it must be construed narrowly "absent further action from Congress." 138 S. Ct. at 1403 (emphasis added).

II. *JESNER* UNDERMINES THE REASONING OF *NESTLÉ II*

Rather than address the impact of *Jesner* on the merits of this appeal, plaintiffs incorrectly assert (ECF 56 at 1-2) that *Jesner* is immaterial to this case because *Nestlé II* is "controlling on this issue." But because *Nestlé II* made no distinction between foreign and U.S. corporations, it is not "controlling" or otherwise binding here.

A decision is not controlling on subsequent panels if a Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc); *see also Galbraith v. Cty. of Santa Clara*, 307 F.3d

1119, 1123 (9th Cir. 2002) (prior decision not controlling when "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.") (quotations omitted).

Nestlé, which involves an ATS claim brought against both domestic and foreign corporations, is currently pending on appeal after the district court dismissed the complaint on remand. *See* No. 17-55435 (9th Cir.).[3] In response to the Court's request for supplemental briefing addressing the impact of *Jesner*, *id.* ECF 45 (Apr. 25, 2018), the plaintiffs conceded that the ATS claim against the foreign corporation defendants in that case "cannot proceed and these parties should be dismissed from the appeal," *id.* ECF 49 at 1. Thus, *Nestlé II* cannot remain controlling law because, as the *Nestlé* plaintiffs recognize, it cannot be reconciled with *Jesner*.

Moreover, the reasoning underlying *Nestlé II* has been undercut by *Jesner* even as to domestic corporations. In addressing corporate liability, *Nestlé II* investigated whether there is a "specific, universal, and obligatory norm preventing corporations—*as opposed to individuals*—from aiding and abetting" an alleged violation of international law. 766 F.3d at 1020 (emphasis added). In concluding that the claim there "may be asserted against the corporate defendants," *id.* at 1022, the Court relied on "principles about corporate ATS liability," including that "there is no categorical

[3] In its FRAP 28(j) letter, Cisco alerted the Court to the *Nestlé* district court's dismissal of that complaint based on *RJR Nabisco*. *See* ECF 41 (Apr. 14, 2017).

rule of corporate immunity or liability" and "norms that are 'universal and absolute,' or applicable to 'all actors,' can provide the basis for an ATS claim against a corporation." *Id.* at 1022 (quoting *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747-48, 760, 765 (9th Cir. 2011)).[4] The Court made no distinction between foreign and domestic corporations in its analysis. *Id.* at 1020-22.[5] Because *Nestlé II*'s reasoning has been undermined by *Jesner*, it is no longer controlling law and this Court is free to visit the question anew, guided by *Jesner*.

In any event, argument in *Nestlé* is scheduled for June 7, 2018. No. 17-55435, ECF 41. To the extent this Court has any doubts, it may await that panel's decision.

III. *JESNER* SUPPORTS DISMISSAL OF PLAINTIFFS' CLAIMS ON EXTRATERRITORIALITY GROUNDS

While the arguments above provide new grounds for affirmance, this Court need not determine the reach and scope of *Jesner* to affirm the district court's ruling. As previously argued (*see* Ans. Br. 15-26), *Kiobel* and *RJR Nabisco* provide definitive

---

[4] Because *Sarei* was subsequently vacated by the Supreme Court, *see* 569 U.S. 945 (2013), that decision, including its reasoning, "has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991); *see also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 n.1 (9th Cir. 1993) (similar).

[5] Even the specific authorities relied upon by *Nestlé II* are undermined by *Jesner*. *Compare Nestlé II,* 766 F.3d at 1022 (citing Nuremberg and international criminal tribunal statutes as supposedly recognizing corporate liability), *with Jesner*, 138 S. Ct. at 1400-01 (plurality op.) (finding that the same authorities demonstrate ATS jurisdiction over only "natural persons," which counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability").

authority that plaintiffs' ATS claims cannot be sustained based on the presumption against extraterritoriality. *Jesner* supports, dismissal on these grounds.

Although *Jesner* found it unnecessary to rule on extraterritoriality, 138 S. Ct. at 1406, it emphasized the same prudential and political concerns the Court previously flagged in holding that the "foreign-policy and separation-of-powers concerns inherent in ATS litigation" mandate "'great caution'" and "'vigilant doorkeeping,'" *id.* at 1403, 1398 (quoting *Sosa*, 542 U.S. at 728). *Jesner* echoed *Kiobel* too in holding that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh [these] foreign-policy concerns," *id.* at 1403 (citing *Kiobel*, 569 U.S. at 116-17), and noted that, whereas "[t]he ATS was intended to promote harmony in international relations … [in *Jesner*], *and in similar cases*, the opposite is occurring," *id.* at 1406 (emphasis added).

RJR Nabisco remains the most recent, explicit guidance on the extraterritoriality inquiry, noting that *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247 (2010), and *Kiobel* "reflect a two-step framework for analyzing extraterritoriality issues." 136 S. Ct. at 2101. *RJR Nabisco* recognized that (unlike in *Morrison*) *Kiobel* had no reason to determine the ATS's "focus" because "'all the relevant conduct' regarding those violations 'took place outside the United States.'" *Id.* (quoting *Kiobel*, 569 U.S. at 124). This suggests that, if "all the relevant conduct" had *not* taken place outside the United States, then the "focus" of the ATS would come into play. *RJR Nabisco*

nonetheless relied on *Morrison* and *Kiobel* in the same breath to conclude that, "[i]f the statute is not extraterritorial," then the second step requires "determin[ing] whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.'" *Id.*; *see also* Ans. Br. at 16-19; ECF 41 (Apr. 14, 2017) (FRAP 28(j) letter addressing *RJR Nabisco*); *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 193-95 (5th Cir. 2017) (applying *RJR Nabisco* to ATS claim).

Jesner corroborates that ATS suits must be tightly policed to ensure they reflect the statute's focus. 138 S. Ct. at 1406 (criticizing basing ATS liability on "relatively minor connection[s]" with the United States).[6] Plaintiffs thus err in asserting (ECF 56 at 5-6) that the "focus" of the ATS plays no role in the analysis; to the contrary, *RJR Nabisco* explicitly relied on *Kiobel* in reaffirming the "focus" test, and *Jesner* did nothing to disturb that ruling, which remains binding and supports affirmance here.

But in any event, because plaintiffs cannot satisfy the presumption against extraterritoriality under any test (Ans. Br. 20-26) or overcome any of the other grounds for affirmance (Ans. Br. 26-56), the Court need not break new ground here.

CONCLUSION

The judgment should be affirmed.

---

[6] Contrary to plaintiffs' assertion (ECF 56, at 5 n.6), Cisco did not argue that a "focus" or *Morrison* test "erased" the "touch and concern" test. Rather, *RJR Nabisco* specifies how the "touch and concern" test should be implemented.

Dated: June 6, 2018

Respectfully submitted,

/s/ Kathleen M. Sullivan

Kathleen M. Sullivan
Isaac Nesser
Todd Anten
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010-1601
(212) 849-7000

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's type-volume limitation as set forth in the Order issued April 25, 2018 (ECF 49) because it does not exceed 15 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman, 14-point type.

Dated: June 6, 2018

/s/ Kathleen M. Sullivan
Kathleen M. Sullivan

Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on June 6, 2018, I electronically filed the foregoing "Supplemental Brief of Defendants-Appellees" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 6, 2018

/s/ Kathleen M. Sullivan
Kathleen M. Sullivan

Attorney for Defendants-Appellees